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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1976

Nos. 76-554, 555

TULARE LAKE CANAL COMPANY and TULARE LAKE BASIN WATER STORAGE DISTRICT,
Petitioners,

VS.

UNITED STATES OF AMERICA,
Respondent.

SALYER LAND COMPANY, a corporation,
Petitioner,

VS.

UNITED STATES OF AMERICA,
Respondent.

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE
and
BRIEF OF BEN YELLEN AND OTHERS, AMICI CURIAE IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit

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Subject Index

	Page
Motion for Leave to File Brief Amici Curiae	1
Interest of Amici	3
Brief of Ben Yellen and Others, Amici Curiae in Opposition to Petitions for Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit	4
Questions Presented	4
Statement	4
Argument	7
Section 8 of the Flood Control Act and Reclamation Law	12
Prepayment of construction costs	19
Conclusion	24

Table of Authorities Cited

Cases	Pages
Hamilton v. Kentucky Distilleries Co., 251 U.S. 146 (1919)	14
Ivanhoe Irr. Dist. v. All Parties, 53 Cal.3d 692, 3 Cal. Rptr. 317, 350 P.2d 69 (1960)	13
Ivanhoe Irrig. Dist. v. McCracken, 357 U.S. 275 (1958)	4, 5, 8, 9, 12, 13, 15, 17, 22, 23, 24
State of Washington v. Udall, 417 F.2d 1310 (9th Cir. 1969)	13
Turner v. Kings River Conservation District, 360 F.2d 184 (9th Cir. 1966)	13, 24
United States v. City and County of San Francisco, 310 U.S. 16 (1940)	20, 21
Wickard v. Filburn, 317 U.S. 111 (1942)	24

Opinions

Pages

Opinion of Attorney General William P. Rogers, 41 Op. A. G. 377, 65 I.D. 549 (1958) 13

Opinions of Solicitor Elmer F. Bennett, 64 I.D., 273 (1957); 65 I.D. 525 (1957) 13

Opinion of Solicitor Frank J. Barry, 68 I.D. 372 (1961), approved by Attorney General Robert F. Kennedy, 68 I.D. 370 (1961) 13, 21

Opinion of Assistant Solicitor Felix Cohen, M-35004, 68 I.D. 408 (1947) 14, 20, 23

Rules

Federal Rules of Appellate Procedure, Rule 35(b) 5

United States Supreme Court Rules, Rule 19 12

Statutes

Act of April 7, 1958, 72 Stat. 82 8
Act of August 6, 1956, 70 Stat. 1044, 43 U.S.C. §422(f) ... 8
Act of August 28, 1954, 68 Stat. 390 8
Act of December 22, 1959, 72 Stat. 641 8
Act of February 21, 1911, ch. 141, 36 Stat. 925, 43 U.S.C. §523 .....11, 12, 22
Act of July 24, 1957, 71 Stat. 309 8
Act of June 16, 1938, 52 Stat. 764, 43 U.S.C. §386 8
Act of June 27, 1952, 66 Stat. 282 8
Act of November 29, 1940, 54 Stat. 1219 8
Act of October 1, 1962, 76 Stat. 677, 16 U.S.C. §835a 8
Act of September 4, 1957, 71 Stat. 608 8

Fact Finders' Act, 43 Stat. 701, 43 U.S.C. §§371, 376, 412, 417, 433, 462, 466, 478, 493, 494, 500, 501, 526 11
Flood Control Act of 1944, §8, Act of December 22, 1944, ch. 665, 58 Stat. 887, 43 U.S.C. §390 .....4, 6, 7, 9, 12, 14, 15

Omnibus Adjustment Act, §46, Act of May 25, 1926, ch. 383, 44 Stat. 649, 43 U.S.C. §423e 4, 6, 10, 22, 23

Pages

Reclamation Act of June 17, 1902, 32 Stat. 389, 43 U.S.C. §§431 et seq. 4, 5, 6, 9, 14, 17, 18

Swamp Lands Act of 1850, 9 Stat. 519 17

II Federal Reclamation and Related Laws Annotated 823 (1972 ed.) 17

Texts

Gates, Reclamation of the Arid Lands, History of Public Land Law Development (Public Land Law Commission, U.S. Govt. Printing Office, 1968) 6, 19
Graham, The Central Valley Project, Resource Development of a Natural Basin, 38 Calif. L. Rev. 588 (1950) 10

Sax, Federal Reclamation Law, II Waters and Water Rights (Clark ed. 1967) 6, 13

Taylor, The Excess Land Law: Execution of a Public Policy, 64 Yale L.J. 477 (1955) 6, 10, 13, 21
The Public Domain: Its History, With Statistics (Public Land Law Commission 1880) 17

Other Authorities

90 Cong. Rec. 4204 (1944) 16

Federal Reclamation by Irrigation, S. Doc. No. 92, 68 Cong., 1st Sess. (1924) 10
First Annual Report of the Reclamation Service, H. Doc. No. 79, 57th Cong., 2d Sess. 70 (1902) 11

Hearings Before House Committee on Irrigation and Reclamation on H.R. 8836 and H.R. 9611, 68th Cong., 1st Sess. 40-41, 330, 331, 334 (1924) 11
H.R. 4485, §6 15

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

Ben Yellen, Harry A. Heath, Frances Heath, Rufina T. Lira, Willie Bronson, H. C. Phillips, Juan Alonso Lira, Manuel Valdiva, Genaro Cuen, Apolinar Gloria, L. M. Menor, Alejo Cortez, Henry Marquez, Maria Marquez, Estala Otero, Juan Sentejas, Alli Slali, Jose Del Real, Jose Gognez, Alex Rodriguez,

Alex Villegas, Sr., John McBailey, Victor Castello, Crescencio Rubio, Robert Majexo, Joe Parra, Wilma Sellers, Marie Eaton, John H. Smith, Albert L. Couch, Frank Eppinger, Margarita Carmelo, Troy W. Sparks, Andy Schrock, Sam L. Gafford, George H. Green, Matilda Fierro, Maria Muevaz, Eugene Nelson, Baldomero Saiza, Benjamin R. Luna, Jr., Jennie Saiza, Felicia Escalera, Anita Lopez, Mrs. Glen Powell, Glen Powell, Josefina Penunuri, Eugenio Ponce, Ruth Valdivia, Juana Padilla, Zoila Viloria, Joaquin Padilla, Juana Ortega, Belle Green, Ruth Hernandez Romero, Mary Araugo, Dolores Martinez, Mike W. Kelley, Carl McLemore, Jose M. Rosales, Isabel Soto, Charles A. Jennings, Barney A. Bean, Pat A. Dean, Cecil Lee Kelley, Mary Guerrero, Joe Ragsdale, Pablo Diaz, June Chambless, Charles E. Perez, Salome S. Perez, Carl R. Grimsley, Junior Robinson, Richard Cheatwood, Mrs. Cruz Limon, Benito Bustamante, Manuel Arauja, Fernando T. Bartido, Albert Armstrong, Laura Jones, Mike Miranda, Marguerite Johnson, Margarita P. Morales, Eva Torres, Mary Villegas, Macario F. Pacheco, Evelyn A. Lloyd, Annie L. Campbell, Grace Duran, Pacundo Madueno, Guadelupe Madueno, Mary Leon, Teresa Arias, Claudian Cocova, Delfina Guebara, Luisa Ramirez, Faustina Rosalez, Petra Medina, Concepcion Settle, Isabel Teniente, Frank O. B. Adams, Palmida Perez, Nellie Rodriguez, Mary Curiel, Johnnie Townsend, Tillie Rodriguez, Jorge Moreno, William Gorham, H. K. Hutchinson, Bertha J. Hutchinson, Obdulia Davila, Lupe Casteneda, Adelaido R. Pasquez, Jr., Ernestina Vasquez, Martha P. Tabarez, Florine

Jones, Henry Clay Pickles, Viola Grimsley, Ida K. Paddock, Pedro Escalera, Olivia Marquez, Cecilia Sandoval and Ygnacio Salazar move the Court for an order permitting them to file the within brief in opposition to the pending petitions for writs of certiorari.

The Solicitor General has consented to the filing of the brief. Petitioners' counsel have declined to consent to the filing of the brief but have stated they do not intend at this time to oppose its filing.

INTEREST OF AMICI

Amici filed a brief amici curiae in the Court of Appeals with the permission of that Court in the present case. Amici had advised the Court of Appeals that the Government did not cite all available authority in its briefs and the Court apparently agreed, for it granted permission to file the brief of Amici *after* oral argument and *after* the case had been taken under submission for decision. Many of the authorities brought to the attention of the Court of Appeals by Amici, not presented by the Government, were cited by the Court of Appeals in its opinion.

Amici are persons who are desirous of purchasing excess lands irrigated by federal reclamation water which would become available for purchase at ex-contract prices. Amici are parties to other litigation involving similar issues as those raised in this case.

Amici believe the brief they propose to file in this case may be of assistance to this Court as their earlier brief was of assistance to the Court of Appeals.

BRIEF OF BEN YELLEN AND OTHERS, AMICI CURIAE IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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QUESTIONS PRESENTED

1. Whether or not §8 of the Flood Control Act of 1944[1] requires the application of federal reclamation law,[2] including the 160 acre limitation of §46 of the Omnibus Adjustment Act,[3] to projects providing irrigation benefits, including the Kings River service area of the Pine Flat Dam in California.

2. Whether or not the advance repayment to the Government of the costs of constructing the project, referred to as "payout", relieves those landowners receiving irrigation benefits for more than 160 acres from the requirement of executing recordable contracts with the Secretary of the Interior, as required by federal reclamation law.

STATEMENT

The opinion of the Court of Appeals authored by Chief Judge Browning was joined by Circuit Judges Duniway and Wallace. The panel hearing and deciding the case denied petitions for rehearing and rejected the suggestions for a rehearing en banc. The

[1]Act of Dec. 22, 1944, ch. 665, 58 Stat. 887, 43 U.S.C. §390.

[2]Act of June 17, 1902, 32 Stat. 388 and Acts amendatory or supplementary thereto, 43 U.S.C. §371 et seq.

[3]Act of May 25, 1926, ch. 383, 44 Stat. 649, 43 U.S.C. §423e. Section 46 of the 1926 Act is a substantial reenactment of §5 of the original 1902 Act, 32 Stat. 389, 43 U.S.C. §431. *Ivanhoe Irrig. Dist. v. McCracken*, 357 U.S. 275, 277-278 n.2 (1958).

full court was advised of the suggestions for en banc rehearings. Not a single judge of the Ninth Circuit, encompassing the Western states most intimately concerned and affected by the decision, requested a vote on the suggestion for rehearing en banc. 535 F.2d at 1144; Fed. R. App. P. 35(b). Among the circuit judges in regular active service are six from the State of California, including two of the judges on the panel (Judges Duniway and Wallace) which heard and decided the case. We call this Court's attention to the geographical representation on the Ninth Circuit only because of the unsupported charges by petitioners that the decision under review will result in ". . . the economic devastation of an important agricultural community in the United States".[3a]

The Reclamation Act, originally enacted in 1902 and supplemented on numerous occasions thereafter, provides in general for the construction and operation by the Government of various dams and appurtenant facilities for the purpose of storing, conserving and regulating the supply of water in the Western states. Although couched in terms which appear to limit its application to the "re-claiming" of arid public lands, privately owned lands having privately developed means of irrigation have been brought into reclamation projects almost from the beginning of the reclamation program in 1902.[4]

Reclamation projects generally serve multiple purposes such as flood control, recreation, protection of

[3a]Tulare Pet. 39.

[4]*Ivanhoe Irrig. Dist. v. McCracken, supra*, 357 U.S. at 283. The Court of Appeals in the present case made a similar observation, citing *Ivanhoe* and other authority. 535 F.2d at 1112.

fish and wildlife, and irrigation. The proportionate costs of constructing a project attributable to irrigation are repaid to the Government over a period of 40 years interest free. In general, repayment today is by state or quasi-state agencies such as irrigation or water districts which in turn pass on these repayment costs to the owners of land who receive benefits from the project.

The history and purpose of the Reclamation Act is summarized in Sax, *Federal Reclamation Law,* §§110-118.4 (pp. 113-191), II Waters and Water Rights (Clark ed. 1967). Additional background is found in Gates, *Reclamation of the Arid Lands,* History of Public Land Law Development, ch. XIII (pp. 635-698), (Public Land Law Commission, U.S. Govt. Printing Office, 1968).

The history and purpose of the 160 acre limitation, sometimes referred to as "the excess land law", is summarized in *Sax, supra,* §120.1 (pp. 210-214) and Taylor, *The Excess Land Law: Execution of a Public Policy,* 64 Yale L.J. 477 (1955).

The Court of Appeals determined that reclamation law applied to such projects as the Pine Flat Dam, having irrigation benefits although constructed under the authority of the Flood Control Act. It also held that advance repayment of construction costs does not relieve private landowners of the necessity to comply with §46 of the Omnibus Adjustment Act by executing recordable contracts as a condition to the receipt of project water for their "excess lands", i.e., those in excess of 160 acres held in individual ownership.

ARGUMENT

When the Flood Control Act of 1944 was before Congress, opponents of applying reclamation law argued as follows: the dominant need for Pine Flat Dam was flood control; private irrigation facilities were in existence; the water of the King's River had been appropriated; and the project would bring no additional arid land under irrigation. These arguments for an exemption from reclamation law were rejected by Congress. 535 F.2d at 1111-1113. In 1950 and 1951, bills were introduced to relieve landowners of the Kings River service area of acreage limitation in return for a lump sum payment of construction costs. Neither bill passed. 535 F.2d at 1139. Petitioners urge the very arguments rejected by Congress as their basis for review. They have now advanced an additional contention that application of the law would be unfeasible. As noted by the Court of Appeals, opposition to the application of reclamation law was not based on the feasibility argument that family farms could not succeed, and there is no indication that either Congress or the Department of the Interior believed this to be true. 535 F.2d at 1114, n.7.

This Court has articulated a rule of statutory construction in the area of federal reclamation law. When confronted with efforts, as here, to imply an exemption from the 160 acre limitation for a particular project, the Court declined and held:

> "Significantly, where a particular project has been exempted because of its peculiar circumstances, the Congress has always made such ex-

emption by express enactment." *Ivanhoe Irrig. Dist. v. McCracken, supra,* 357 U.S. at 292, relied on by the Court of Appeals at 535 F.2d at 1099.[5]

Petitioners are seeking to have this Court infer from the statute the very exemption Congress refused to provide during the legislative process. The rule of *Ivanhoe Irrig. Dist. v. McCracken,* enunciated by a unanimous Court less than 20 years ago, is entitled

[5]This Court's reasoning is not subject to challenge. Where special circumstances exist, Congress has specifically provided for exemptions from "the excess-land provisions of the Federal reclamation laws". See Act of June 27, 1952, 66 Stat. 282 (San Luis Valley Project, Colorado):

"The excess-land provisions of the Federal reclamation laws shall not be applicable to lands or to the ownership of lands which receive a supplemental or regulated supply of water from the San Luis Valley project, Colorado: . . ."

The Act of July 24, 1957, 71 Stat. 309 (Missouri River Basin, East Bench Unit) provides:

"Except as provided in section 2 of this Act, the excess land provisions of the Federal reclamation laws shall not apply to lands in the . . . of the East Bench unit of the Missouri River Basin project, . . . that are irrigated under existing State water rights, whether the waters used for their irrigation are passed through, regulated by, or stored in the Clark Canyon Reservoir by the United States."

The Act of April 7, 1958, 72 Stat. 82 (Lower Rio Grande Project, Mercedes Division) provides:

"The excess-land provisions of the Federal reclamation laws shall not be applicable to lands in this project which now have an irrigation water supply from sources other than a Federal reclamation project, and for which no new waters are being developed."

There are numerous other examples.

Act of June 16, 1938, 52 Stat. 764, 43 U.S.C. §386 (Colorado-Big Thompson Project); Act of November 29, 1940, 54 Stat. 1219 (Truckee River and Humboldt Projects); Act of August 28, 1954, 68 Stat. 390 (Owl Creek Unit, Missouri River Basin Project); Act of August 6, 1956, 70 Stat. 1044, 43 U.S.C. §422(f) (small reclamation projects); Act of September 4, 1957, 71 Stat. 608 (Kendrick Project); Act of December 22, 1959, 72 Stat. 641 (Lower Rio Grande Rehabilitation Project, La Feria Division); Act of October 1, 1962, 76 Stat. 677, 16 U.S.C. §835a (Columbia Basin Project).

to a longer life than that afforded by petitioners, who seek its abandonment. The Flood Control Act itself contains no clear exemption from acreage limitation, and under this Court's rule of statutory construction in *Ivanhoe,* none could be implied. Nevertheless, the Ninth Circuit carefully re-examined the legislative history in great detail to show that Congress did not intend to create a statutory exemption. 535 F.2d at 1099-1118. Petitioners make no serious effort to undermine the accuracy of the Court's recitation of the legislative history.

From the very beginning of their petitions and throughout, petitioners' purported statements of fact are, significantly, unaccompanied by supporting references to statutory, legislative, administrative or judicial materials. Contrary to the suggestions of petitioners, the Reclamation Act does not in any way limit *land* use, it merely limits the use of the federal subsidy of reclamation water. Petitioners fail to recognize that land ownership and water use have been separate throughout the history of the Western states in the lands "west of the hundredth meridian". By emphasizing *land* policy and underemphasizing *water* policy, petitioners tend to exploit their confusion to their own advantage. The implication of petitioners that they have some kind of moral claim to the stored and regulated waters of the Kings River is in complete disregard of the purposes and policies of the Reclamation Act and the conditions attached to the receipt of its benefits. The clear distinction between *land* ownership and *water*

use is illustrated in the commentary on the 160 acre limitation in Taylor, *supra,* 64 Yale L.J. 477-79. See also Graham, *The Central Valley Project, Resource Development of a Natural Basin,* 38 Calif. L. Rev. 588, 604 (1950):

> "The [160 acre] limitation neither legally nor factually is one on the ownership of land—it rather is one on the amount of the owned land which may *receive water from a federal reclamation project.* Nor does it go in any way, as is often asserted, toward regulating what a landowner does with whatever water supply he may already have." (emphasis from original)

Petitioners do not hesitate to dwell upon the fact that private land may be affected by implementation of the applicable law. Petitioners' suggestion that there may be a meaningful distinction between "public" and "private" lands in the context of reclamation law is misplaced. Nowhere in the legislative history of §46 of the Omnibus Adjustment Act or in any other provision of reclamation law is there a distinction between private and public lands or between lands that were previously developed with private resources or public funds. The Court of Appeals rejected any such distinction,[6] relying upon a report to President Coolidge by a special committee of advisors to devise means of improving the reclamation program, who were known as the "Fact Finders". This report, sometimes referred to as the "Fact Finders' Report",[7]

[6]535 F.2d at 1112.

[7]*Federal Reclamation by Irrigation,* S. Doc. No. 92, 68 Cong., 1st Sess. (1924).

makes it crystal clear that private lands have long constituted a major portion of the reclamation program.[8] The legislative history of the Fact Finders' Act,[9] adopting many of the recommendations from the Fact Finders' Report, clearly shows that lands developed privately were to be included within irrigation projects.[10] Section 46 generally followed the recommendation of the Fact Finders[11] and was the outgrowth of that report.

As far back as 1903, the First Annual Report of the Reclamation Service said:

> "Recognizing the fact that there is scarcely a section of the country in the United States, even in the most sparsely settled regions of the West, where an irrigation project would not involve the reclamation of lands in *private ownership,* as well as those belonging to the United States, this section [§5 of the 1902 Act, 32 Stat. 389, 43 U.S.C. §431] authorizes the sale of the right to use water for land in private ownership, to be limited, however, to the amount required for a tract not exceeding 160 acres."[12] (emphasis added).

The Warren Act, enacted in 1911 for the purpose of enabling the Secretary of the Interior to contract

[8]*Id.* at 4, 116, 132-33.

[9]43 Stat. 701, 43 U.S.C. §§371, 376, 412, 417, 433, 462, 466, 478, 493, 494, 500, 501, 526.

[10]See *Hearings Before House Committee on Irrigation and Reclamation on H.R. 8836 and H.R. 9611,* 68th Cong., 1st Sess. 40-41, 330, 331, 334 (1924).

[11]535 F.2d at 1132-33.

[12]*First Annual Report of the Reclamation Service,* H. Doc. No. 79, 57th Cong., 2d Sess. 70 (1902).

for the impounding, storage and delivery of irrigation water, provided in part:

> ". . . water so impounded, stored, or carried shall not be used otherwise than as prescribed by law as to lands held in *private ownership* within Government reclamation projects"[13] (emphasis added)

This Court, too, has observed that the requirements of federal reclamation law apply to lands in the Central Valley of California which "had been reclaimed and irrigated at the inception of the project" through private efforts. *Ivanhoe Irrig. Dist. v. McCracken, supra,* 357 U.S. at 283. The existence of irrigated, non-arid land is of no significance, for, as the Court noted, the object of reclamation is to arrest the irregular flow of water and regulate its seasonal and year to year variations. *Id.* at 281. The Court of Appeals' opinion made a similar determination. 535 F.2d at 1112-13, 1144.

SECTION 8 OF THE FLOOD CONTROL ACT AND RECLAMATION LAW

Petitioners have manifestly failed to demonstrate special and important reasons for a grant of the writ of certiorari under the standards of this Court's Rule 19. The Court of Appeals' careful, detailed and scholarly examination, analysis and conclusion that §8 of the Flood Control Act requires the application of federal reclamation law to the Pine Flat Dam is

[13]Act of Feb. 21, 1911, ch. 141, 36 Stat. 925, 43 U.S.C. §523.

completely consistent with every judicial, administrative and academic opinion on the subject. Its conclusion was mandated by the Ninth Circuit's earlier decision in *Turner v. Kings River Conservation District,* 360 F.2d 184, 192 (9th Cir. 1966). It is also completely in accord with *all* previous administrative determinations of two Solicitors of the Department of the Interior and two Attorneys General:

> Opinions of Solicitor Elmer F. Bennett, 64 I.D., 273 (1957); 65 I.D. 525 (1957).
>
> Opinion of Attorney General William P. Rogers, 41 Op. A. G. 377, 65 I.D. 549 (1958).
>
> Opinion of Solicitor Frank J. Barry, 68 I.D. 372 (1961), approved by Attorney General Robert F. Kennedy, 68 I.D. 370 (1961).

The Court of Appeals' opinion is in harmony with the views of the most eminent and respected commentators of the reclamation program. Sax, *Federal Reclamation Law,* II, Waters and Water Rights §120.5 (p. 217); Taylor, *The Excess Land Law: Execution of a Public Policy,* 64 Yale L.J. 477, 489-514 (1955). It is significant that this Court referred, with approval, to Professor Taylor's commentary in its landmark opinion on the Reclamation Act. *Ivanhoe Irrig. Dist. v. McCracken, supra,* 357 U.S. at 292. Other courts have afforded Professor Taylor's commentary similar respect. *State of Washington v. Udall,* 417 F.2d 1310, 1312, n. 1 (9th Cir. 1969); *Ivanhoe Irr. Dist. v. All Parties,* 53 Cal.3d 692, 707, n. 4, 3 Cal.Rptr. 317, 350 P.2d 69 (1960).

It is noteworthy that neither of the petitions before this Court have made reference to a single judicial or administrative precedent to support their argument that reclamation law does not apply to all or any part of the area served by the Pine Flat Dam. Even Associate Solicitor Cohen,[14] upon whom petitioners place such heavy reliance, was not called upon to question the applicability of reclamation law to this project.

Thus, instead of dealing with the precedent concerned specifically with the Pine Flat Dam, petitioners have chosen to challenge the legislative purpose behind both the Flood Control Act and the Reclamation Act. They prefer to rely on makeweight arguments of destroying "the settled economy of an important agricultural community",[15] destruction of "irrigation works and canals . . . privately paid for"[16] and a perfunctory, distorted representation of the legislative history.[17] Petitioners' *ipse dixit* argument asks this Court not only to overrule all previous judicial and administrative precedent, but also to question the wisdom of the legislation. Even if it wanted to do so, this Court may not inquire into the wisdom of legislation. *Hamilton v. Kentucky Distilleries Co.*, 251 U.S. 146, 161 (1919). The Court has already rejected the well-worn argument that reclamation law is unconstitutional, unworkable, unreasonable and arbitrary when applied to an agricultural economy. *Ivanhoe Irrig. Dist. v. McCracken, supra,* 357 U.S. at 295-97.

[14]Memorandum M-35004, 68 I.D. 408 (1947).
[15]Tulare Pet. 34.
[16]*Ibid.*
[17]*Id.* at 34-39.

Finally, we call the Court's attention to the only two specific references by petitioners to the legislative history which they contend conflict with the Ninth Circuit's decision. Both references by petitioners are simply misleading.

First, reference has been made to an ambiguous comment by Congressman Whittington, Chairman of the House Flood Control Committee, during debate on the Flood Control Act of 1944, considered by petitioners to be "[I]llustrative of this history . . . which the Court of Appeals ignored or mischaracterized".[18] Petitioners have apparently overlooked the Court's examination of Congressman Whittington's participation in the debates.[19] We suggest it is petitioners, not the Court of Appeals, who have "ignored or mischaracterized" this history. No matter what label is placed upon petitioners' "illustrative" excerpt from the legislative history, they have conveniently omitted a most significant statement by Congressman Whittington, who was in charge of the bill on the floor of the House, concerning §6 of H.R. 4485, the forerunner of §8 of the 1944 Flood Control Act:

> "Mr. Whittington. Mr. Chairman, some of the friends and spokesmen for reclamation were critical of the language in the bill. It was asserted that where provision was made in a reservoir

[18]Tulare Pet. 35.
[19]535 F.2d at 1104-05.

where there was water for reclamation that the Commissioner of Reclamation should have the power to prescribe regulations ad libitum without regard to existing law. This is merely a perfecting amendment. *This amendment provides that these regulations shall be under existing reclamation law.* It is a perfecting amendment." (90 Cong. Rec. 4204 [1944]). (emphasis added).

The Court of Appeals properly interpreted the remarks of Congressman Whittington and others as acknowledgment and recognition that reclamation law would apply to the bill.

Further reliance has been placed upon a restrained and ambiguous statement of President Roosevelt.[20] The Court of Appeals properly considered this reference as "hardly a significant indication of the meaning of the statute".[21]

Assuming a presidential statement is to be considered as part of the legislative equation, we think it significant to observe the clear and unambiguous comment of President Truman on May 3, 1946, when he approved the appropriation measure for construction of the initial phase of the Pine Flat Dam:

> "The War Department Civil Functions Appropriation Bill, 1947 (H.R. 5400), which I approved on May 2, 1946, makes appropriations for a number of thoroughly worth-while projects that will further the development of the water resources of the Nation. I am also glad to note that the Congress, by the addition of certain provisos to

[20]Tulare Pet. 38.

[21]535 F.2d at 1117.

> the item for the Kings River Project, California, has afforded an opportunity for assuring that the Federal reclamation policy, including repayment and the wide distribution of benefits, will apply to that project. This is in accordance with the view that I have heretofore expressed and the position repeatedly taken by the late President Roosevelt. It is consistent with the policies laid down by the Congress in the Flood Control Act of 1944."[22]

As the foregoing discussion demonstrates, Congress evidenced no intention whatsoever to exempt the area served by Pine Flat Dam from the requirements of federal reclamation law. The efforts of petitioner Salyer Land Company to create an exemption for a smaller portion of that area, originally acquired under the Swamp Lands Act of 1850,[23] is similarly unavailing. Petitioner is unable to point to any provision of reclamation law exempting lands acquired as "swamp lands" and thus is met at the threshold with the *Ivanhoe* rule against exemptions by implication. (357 U.S. at 292).

The Ninth Circuit gave petitioner Salyer's argument the short shrift it deserved, correctly noting that the phrase "arid lands" in the title of the Reclamation Act of 1902 was a term of art used to refer to the lands of the sixteen Western states included within the Act's purview.[24] This point is amply dem-

[22]Reprinted in II Federal Reclamation and Related Laws Annotated 823 (1972 ed.).

[23]9 Stat. 519.

[24]535 F.2d at 1117.

onstrated by the very Congressional debates relied upon by petitioner, in which, for example, the "arid and semi-arid" lands of the West are compared with the "humid and sub-humid regions."[24a] At no point in the Reclamation Act itself, or the debates preceding it, is it even remotely suggested that Congress intended to limit reclamation jurisdiction in the West by use of the term "arid lands". Indeed, this purported jurisdictional test is nowhere even defined in federal reclamation law.

Salyer's overly ingenious argument that Congress secretly intended to create an exemption for swamp and overflow lands within the Kings River service area is erroneous for another simple reason. Without irrigation, swamp land is worthless.

> "More than 70,000,000 acres of the richest land in this country are now practically worthless or of slight value by reason of overflow and swamp conditions. 1 Kinney *On Irrigation and Water Rights* 23 (1912 ed.)
>
> ". . . holding back a considerable portion of the flood water of our great river systems in great reservoirs for the purpose of irrigation is already having the effect in aiding in the reclamation of swamp lands along their lower reaches. And, as greater storage works are constructed and utilized, this result will become greater and greater; and, at the same time, the water held up may be used for irrigation of arid lands, and for power purposes. It can be readily seen that, if the water of a river system is held up, and a considerable portion of the same is not permitted

[24a]Salyer Pet. 15.

> to flow down during the periods of high or flood water, the low lands adjacent to the lower portions of the river are not as liable to be newly flooded, and at the same time the main channel of the river will be kept open for the drainage of these low lands." *Id.* at 24.

Similar reasons for not implying the exemption sought by Salyer Land Company are found in the writings of historian Paul Wallace Gates. In the San Joaquin Valley of California, where the area served by Pine Flat Dam is located, Professor Gates described the concentration of ownership under the Swamp Lands Act of "great blocks of land that later, *when irrigated*, were to become very valuable."[25] Where such concentrated landholdings receive essential federal reclamation benefits, no policy justification is suggested by petitioner for creating an exemption from federal reclamation law—and none is apparent.

PREPAYMENT OF CONSTRUCTION COSTS

The total lack of merit to petitioners' argument on payout appears as much from obvious omissions in their petitions as from the superficial, unsubstantiated contentions actually advanced. Two crucial observations were made by the Court of Appeals in rejecting the payout argument. Neither has been challenged or explained away by petitioners.

[25]Gates, *History of Public Land Law Development*, *supra*, at 327. *See also id.* at 331, 334. (emphasis added). Further background on the Swamp Lands Act is found in *The Public Domain: Its History, With Statistics*, 219-221 (Public Land Law Commission 1880).

First, the Court of Appeals observed the "somewhat inconsistent" contentions of petitioners that Congress granted the Kings River Project a total exemption from reclamation law in the Flood Control Act and Congress in the same statute also authorized the landowners to escape the 160 acre limitation of reclamation law by payout. 535 F.2d at 1137. The Court was charitable with its euphemism. Incredibly, these inconsistent contentions are repeated in the Tulare petition, despite an effort to obscure the inconsistency by treating them in reverse order from the order of consideration by both the Court of Appeals and the District Court. No effort has been made to explain this readily apparent inconsistency.

Secondly, the Court of Appeals observed that bills were introduced in 1950 and 1951 to relieve Kings River landowners of acreage limitations in return for a lump sum payment of construction costs. Neither passed. *Id.* at 1139. It is perfectly apparent that such bills would have been completely unnecessary had the 1947 Cohen opinion and petitioners' theory of payout had any legal sufficiency or respectability whatever. In light of the total absence of a statutory exemption from reclamation law and the congressional rejection of bills specifically designed to accomplish that result by means of payout, the Court below was required to reject the payout argument. If any official of the Department of Interior had authorized such a device to escape reclamation law, he would have been simply thwarting the plain purpose of a valid law and acting beyond the scope of his authority. *United States v.*

City and County of San Francisco, 310 U.S. 16, 31-32 (1940).

Petitioners' silence about these matters in two, separate petitions is proof positive of the utter lack of merit in their requests for review.

As for the issues actually discussed by petitioners, several fundamental misconceptions regarding the ingenious payout issue of reclamation law permeate their arguments and require clarification. An assumption which underlies petitioners' argument is that the 160 acre limitation and recordable contract requirement of federal reclamation law are primarily security devices to ensure recoupment of the federal investment allocable to irrigation.[26] Applicable authorities, including the Court below, have uniformly rejected this "creditor-debtor" view and held, instead, that these provisions were the means adopted by Congress to ensure against monopolization and speculation with the federal subsidy. 535 F.2d at 1121. See also, *Taylor, supra,* 64 Yale L.J. at 489-514; Opinion of Solicitor Barry, 68 I.D. 372, 395 (1961).

Petitioners are simply incorrect when they assert that landowners of the King's River Service Area have forsaken the federal subsidy available by prepaying their allocable share of the construction costs.[27] As the Ninth Circuit correctly noted, repayment without interest charges over a forty-year period is only one aspect of the substantial federal subsidy conferred.

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[26]See, *e.g.*, Tulare Pet. 8, 32-33.
[27]*Id.* 5, 8, 32.

535 F.2d at 1113, 1120-31, and n.'s 99 and 103.[28] In the statutory scheme, enactment of excess land limitations was in part motivated by the desire of Congress to eliminate a windfall enhancement in land values due to the irrigation benefits of the project. *Id.* at 1121. Many other benefits to landowners, such as flood control, are not reimbursable at all. *Id.* at 1120. Non-reimbursable benefits were recognized by this Court in *Ivanhoe Irrig. Dist. v. McCracken, supra,* 357 U.S. at 295-96.

Petitioners mount no challenge of substance to the Ninth Circuit's extensive analysis of the language[29] and legislative history[30] of the relevant provisions of reclamation law negating the payout theory. Since petitioners apparently concede that neither §46 nor any other provision of the reclamation law contains an express payout exemption, the rule of construction of reclamation law set out in *Ivanhoe Irrig. Dist. v. McCracken, supra,* 357 U.S. at 292, bars creation of a payout exemption by implication.

Nevertheless, petitioners suggest the Court of Appeals disregarded "the Cohen opinion and its prog-

[28]See also, §2 of the Warren Act of 1911, 36 Stat. 926, 43 U.S.C. §524. The Warren Act authorized the "impounding, storage and carriage" of water in excess of the requirements of lands within the project and provided that such surplus water could not be sold to any landowner in excess of an amount sufficient to irrigate 160 acres. The only benefit to these landowners outside the projects is regulation of the flow of water, yet Congress provided that acreage limitations would apply even to them. The regulated flow of the stored water of the Kings River is the major benefit of the Kings River project, making water available when it otherwise would not be. 535 F.2d at 1113.

[29]535 F.2d at 1118-19.

[30]*Id.* at 1122-35.

eny."[31] Under the circumstances presented in the case at bench, the Cohen opinion cannot be elevated to the status of a longstanding, consistent administrative practice. Indeed, petitioners have been unable to demonstrate that the Cohen opinion is entitled to the respect usually afforded the administrative practice of an agency.

The Ninth Circuit examined the practice of the Department of the Interior and did not find the "long-established administrative rulings and practices" claimed by petitioners.[32] After a detailed examination and analysis of the relevant statutes, regulations and administrative interpretations beginning with the 1902-12 period, the Court determined that, except for a brief period in the 1950's, the administrative practice was contrary to the payout theory. The Court determined that the 1947 Cohen opinion was "patently wrong", immediately challenged, always in dispute, and soon overruled. In short, as the Ninth Circuit's detailed discussion shows, there was never an administrative practice of payout sufficient to be of any legal significance. The Court's conclusion is corroborated by the consistent refusal of the Secretary of the Interior to execute a repayment contract providing for lump-sum payout. No such contract has ever been signed.[33]

[31]Tulare Pet. 15-20.

[32]535 F.2d at 1136-43.

[33]The complete answer to petitioners' argument that if payout is not an implied exemption, §46 constitutes an unconstitutional taking of property (Tulare Pet. 32-33) is found in the *Ivanhoe* opinion, *supra,* 357 U.S. at 296: "It is hardly lack of due process for the Government to regulate that which it subsidizes", citing

CONCLUSION

When petitioners' arguments were presented to Congress, they were rejected. Two Solicitors and Attorneys General followed suit. The Court of Appeals, guided by the statutory language, regulations and administrative practice, this Court's *Ivanhoe* opinion and its own earlier decision in *Turner v. Kings River Conservation District,* reached the same result. The Ninth Circuit's opinion has not been shown to be inconsistent in any way with long established legal principles.

A particular landowner may, if he wishes, forego the irrigation benefit resulting from the project. If he decides to do so, he may retain both his pre-existing water supply and his excess land.[34] If, on the other hand, he elects to participate in the project and receive its benefits, he must comply with reclamation law. If petitioners and the landowners of the King's River service area believe they are entitled to redress, we suggest they have chosen the wrong forum.

For the foregoing reasons, the petitions for writs of certiorari should be denied.

Dated, San Francisco, California,
November 29, 1976.

Respectfully submitted,
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Wickard v. Filburn, 317 U.S. 111, 131 (1942). In addition, the Court in *Ivanhoe* noted that the courts are open for redress if the United States takes any compensable water or property right. *Id.* at 297.

[34] 535 F.2d at 1144.